NOT YET SCHEDULED FOR ORAL ARGUMENT

United States Court of Appeals for the District of Columbia Circuit

No. 17-1065

(Consolidated with 17-1111)

T-MOBILE USA, INC.,

Petitioner-Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross-Petitioner.

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Intervenor.

On Petition for Review and Cross-Application for Enforcement from an Order of the National Labor Relations Board in Nos. NLRB-01CA123183, NLRB-01CA129976 and NLRB-01CA140752.

REPLY BRIEF FOR PETITIONER-CROSS-RESPONDENT

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August 3, 2017

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GLOSSARY

Board	National Labor Relations Board
T-Mobile	T-Mobile USA, Inc.
Act	National Labor Relations Act
ALJ	Administrative Law Judge
General Counsel	General Counsel for the National Labor Relations Board
CWA	Communications Workers of America
NLBR Br.	Brief for the National Labor Relations Board, filed on July 13, 2017 (No. 1683861)
P. Br.	Brief for Petitioner-Cross-Respondent, T-Mobile USA, Inc., filed on June 13, 2017 (No. 1679497)
A-	Joint Appendix

SUMMARY OF THE ARGUMENT

The National Labor Relations Board ("Board") fails to provide a rational, well-supported justification for the rule it adopts in this case: that an employer in possession of concrete, objective evidence of a union's loss of majority support has only two choices. On the one hand, withdraw recognition from the union and cease dealing with it altogether. On the other, treat the union as if it remained the employees' chosen representative in all respects, including by entering into an entirely new collective bargaining agreement covering those employees, until the question of representation is decided through an election, which may be blocked for months or years. Although the Board argues that this rule was "well-established" prior to its decision here (NLRB Br. at 19, 36),[1] it does not, and cannot, point to any precedent that informs employers holding proof that the union no longer enjoys majority support and that they only have two, all-or-nothing, options—terminate the union relationship entirely or thoroughly ignore the evidence at hand and, consequently, the employees' desires. Indeed, by adopting this rule, the Board deviates from its own case law and the principles it lays out, and, ironically, undermines the bargaining relationship rather than protecting it.

While the Board is entitled to formulate rules in the process of carrying out its statutory duties, those rules must be rational, consistent with the policies of the

[1] References to "NLRB Br." are to the Brief for the National Labor Relations Board, filed on July 13, 2017 (No. 1683861).

National Labor Relations Act ("Act"), and supported by substantial evidence. None of these requirements are met here. First, the Board's zero-sum rule is not rational or consistent with the Act. While purportedly grounded in the policies of the Act, the rule fails to strike a proper balance between two of the statute's core principles—promoting stability in labor relations and encouraging employee free choice. Rather, ignoring decades of precedent that balances these statutory goals, the rule forces the employer to choose one over the other. The Board fails to put forward a satisfactory explanation for this approach and to offer any rational connection between the facts of this case and the conclusion that where the union has actually lost majority support, any intermediate step (*i.e.* suspending negotiations toward a successor agreement but otherwise maintaining the *status quo* pending resolution of the representation question) is unlawful. The explanations provided by the Board are strained and counter-intuitive.

Without citing to any evidence, the Board states in its decision, and argues in its brief, that placing successor contract negotiations on hiatus under these circumstances would unduly destabilize the parties' bargaining relationship. However, it does not reconcile this argument with its holding that an employer may proceed to fully withdraw recognition—and thus take the most destabilizing step of all. Also arbitrary are the Board's explanations for why an employer's suspension of negotiations for a successor contract but continuing recognition of

the Communications Workers of America ("CWA" or the "Union") is more destabilizing to the bargaining relationship than the two options the Board considers lawful. The Board states that such action would make it harder for the parties to find common ground and reach agreement but, again, does not reconcile this with the concept of being able to withdraw recognition altogether. And the same is true for the Board's reasoning that such action would weaken the union.

Also unreasonable is the Board's attempt to fit the facts of this case into a legal theory that was never advanced or litigated—that of "piecemeal bargaining." The Board moves from merely arguing in its decision that the conclusion it reached finds support in the "longstanding policy disfavoring the practice of 'piecemeal bargaining,'" to claiming in its brief that when T-Mobile did bargain with CWA, it *actually engaged* in such practice, and that the Board's decision provides "concrete examples" of the Company's doing so. (A-095, n. 4; NLRB Br. at 23-24.) A claim that any instance in which T-Mobile bargained with CWA amounted to bargaining in bad faith because it constituted piecemeal bargaining was never made in this case, let alone tried on the merits. The assertion that T-Mobile actually bargained on a piecemeal basis is novel and unsupported. It is also misplaced.

As the Board recognized in its decision, the concept of piecemeal bargaining arises "*during contract negotiations*" and "the context of the present case is

different." (A-095, n.4.) (emphasis added). Piecemeal bargaining involves attempts to fragment ongoing contract negotiations by removing specific issues from general bargaining discussions, either through insistence that the issues be addressed separately or through unilateral implementation of proposals on the isolated matters. Here, T-Mobile suspended bargaining over a new contract, and every subject that contract might address, entirely. The Company never insisted on addressing separately issues that would otherwise be discussed in general bargaining, and never unilaterally implemented proposals on such issues while contract negotiations were ongoing or otherwise. The only thing it did was honor all of its other bargaining obligations, irrespective of subject matter, while the question of CWA's representative status was pending. Accordingly, piecemeal bargaining is inapplicable and does not support the Board's conclusion, and it is inappropriately asserted as a theory of violation in its brief.

Furthermore, the reasons the Board offers for its conclusion are entirely unsupported and outright ignore the actual record evidence. There is no evidence that the suspension in contract negotiations made it difficult for the parties to reach common ground or to compromise on any issue. In fact, the record evidence establishes that T-Mobile and CWA were able to reach agreement on every matter that required bargaining after contract negotiations were placed in abeyance; and there is not even as much as a suggestion that their path to agreement was made

harder by the fact that a successor contract was not being discussed. There also is no proof that T-Mobile bargained with CWA only over matters with respect to which it held an advantage, and no claim of the sort was ever made by CWA. This is pure speculation contradicted by evidence that aside from the successor contract, the parties bargained over every issue that required bargaining under the law. The same evidence also establishes that T-Mobile initiated bargaining over changes that CWA viewed as beneficial to its members, undermining any supposition or contention that the Company negotiated only when it had "leverage" or was in a position that did not require it to give any concessions. As to the Board's premise that by suspending contract negotiations but not going as far as withdrawing recognition T-Mobile weakened CWA, that premise requires turning a blind eye to many facts. At the time T-Mobile placed contract negotiations in abeyance, CWA already had lost the support of its members. By continuing to engage CWA on everyday workplace issues rather than deciding to not recognize it at all, T-Mobile actually provided CWA with an opportunity to show involvement and effectiveness, and thus strengthened it. Thus, there is no connection between any of the facts in the record and the inferences drawn by the Board.

Because the Board's explanations for its decision are not rational or supported by any evidence, the decision should be reversed.

STANDARD OF REVIEW

The Board relies heavily on the argument that deference must be accorded to its determination because it is the agency primarily responsible for developing and applying national labor policy and, as such, it is up to it and not the courts to make policy determinations and develop rules governing labor relations. (NLRB Br. at 12-14.) Deference does not require abdication of the Court's reviewing function, however. In fact, this Court only defers to the Board's conclusions and respects its discretion only when it is exercised after thoughtful consideration of the record, in light of the relevant policies of the Act and of precedent:

> [i]n assessing the Board's decision, we must ensure it 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.' . . . The Board's decision is arbitrary if it 'entirely fail[s] to consider an important aspect of the problem' or 'offer[s] an explanation for its decision that runs counter to the evidence before the agency.' . . . Accordingly, our deferential standard of review applies only where 'the process by which [the Board] reaches [a] result' is 'logical and rational'—in other words, the Agency has engaged in 'reasoned decisionmaking.'

Fred Meyer Stores, Inc. v. NLRB, Case No. 15-1135, _ F.3d _, 2017 WL 3255163, at *5 (D.C. Cir. Aug. 1, 2017) (citing *Motor Vehicle Mfgs. Ass'n v. State Farm*

Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) and *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998)).

Where, as in the present case, the Board draws arbitrary or irrational conclusions, in contravention of basic policies of the Act and record evidence, deference to administrative discretion is not afforded. *Fred Meyer Stores*, 2017 WL 3255163, at *5 (denying enforcement of Board order where the agency "behaved in an arbitrary and capricious manner by failing to engage in reasoned decisionmaking[,] . . . reasonably reflect upon the information contained in the record and grapple with contrary evidence"). *See also Teamsters Local Union No. 175 v. NLRB*, 788 F.2d 27, 31-32 (D.C. Cir. 1986) (declining to enforce bargaining order where the Board's decision "rest[ed] on an irrational hypothetical" that "lack[ed] support in substantial evidence" and was "counter-intuitive . . . and . . . without support in precedent"); *Cleveland Constr., Inc. v. NLRB*, 44 F. 3d 1010, 1014) (D.C. Cir. 1995) (in reversing Board decision, observing that the Court's "review must take into account whatever in the record fairly detracts from the weight of the evidence cited by the Board to support its conclusions; we will not merely rubberstamp NLRB decisions"); *Thomas–Davis Medical Ctrs. v. NLRB*, 157 F.3d 909, 913-14 (D.C. Cir. 1998) (denying enforcement of Board bargaining order where "Board failed to adequately explain its reliance on [a] rule in light of past practice. . . . The Board must provide a reasoned explanation, either consistent

with precedent or explaining its departure therefrom, if it chooses to . . . expand [a] rule's scope . . . . Neither the [Board's] summary . . . decision . . . nor the boilerplate language in . . . [its] order satisfie[d] this standard.") (citations omitted); *Georgetown Hotel v. NLRB*, 835 F.2d 1467, 1468 (D.C. Cir. 1987) (denying enforcement of bargaining order where "the chain of inferences adopted by the Board [wa]s devoid of support").

And while the Board may adopt new rules, such rules must be "rational" and based on a "sound . . . connection between [any] proved and inferred facts." *Lee Lumber and Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1459 (D.C. Cir. 1997) (internal quotations and citations omitted). In other words, "the Board, like every other administrative agency, must provide a logical explanation for what it has done." *Id*. at 1460 (denying enforcement where Board failed to meet this requirement) (citing *Motor Vehicle Mfrs.*, 463 U.S. at 43).

Moreover, the Board's conclusion here may not be entitled to any deference at all because the Board did not engage in any fact-finding or interpretation of the provisions of the NLRA. Rather, it only made a legal determination based largely on the stipulation that after receiving proof of CWA's loss of majority support, T-Mobile suspended bargaining for a successor agreement. *See NLRB v. Yeshiva Univ.*, 444 U.S. 672, 691 (1980) (refusing to defer to Board order decided "on the basis of conclusory rationales rather than examination of the facts of each case").

ARGUMENT

A. The Board's Efforts to Evade or Mischaracterize the Context in Which the Events at Issue Arose Should Be Rejected

In its brief, the Board attempts to gloss over and at times even mischaracterize the context within which T-Mobile's suspension of negotiations toward a successor collective bargaining agreement occurred. This context, however, is important. It bears upon the reasonableness of T-Mobile's action and of the Board's reasons for concluding that the action was unlawful. T-Mobile placed in-person contract negotiations in abeyance pending resolution of CWA's representative status after a majority of CWA employees executed not one, but two petitions—a decertification petition that they filed with the Board and a second petition, signed by a majority of the bargaining unit, which unambiguously informed T-Mobile that employees no longer wished to be represented by CWA. (P. Br. at 7-8.)[2] While the Board's brief conveniently focuses on the decertification petition, T-Mobile did not cease to negotiate a new collective bargaining agreement based on a decertification petition that needed to be supported by a mere 30% of the bargaining unit to get an election. It did so based on concrete, objective evidence demonstrating *actual* loss of support by CWA from a majority of employees it purported to represent. (Id. at 7-9.) No one, at any

[2] References to "P. Br." are to the Brief for Petitioner-Cross-Respondent, T-Mobile USA, Inc., filed on June 13, 2017 (No. 1679497).

stage, has ever challenged this evidence, argued that CWA continued to enjoy majority support at the time T-Mobile suspended negotiations, or contended that the Company was mistaken in its belief that CWA had lost such support—a belief that was clearly articulated to CWA in T-Mobile's letter announcing suspension of contract negotiations. (A-599.)[3]

Furthermore, T-Mobile made the decision to not engage in bargaining over a new contract only after the employees' decertification petition had sat idle for seven months, and it was clear that an election would not be held anytime soon. The Board brushes over the fact that it chose to block the decertification election based on several charges from CWA and takes issue with T-Mobile's characterization of these charges as frivolous. (NLRB Br. at 34-35.) There is no question that the charges *were* frivolous, and the Board unreasonably relied on them to delay the employees' ability to vote, although there was no allegation that the conduct underlying the charges contributed to the deterioration of support for CWA.[4] The alleged unilateral change resulting from the "at will" policy was not even a change at all, as the policy had appeared in every version of the T-Mobile

[3] Nor has anyone ever asserted that the evidence supporting any petition was somehow tainted by the conduct alleged in the dismissed unfair labor practice charges.

[4] The Board's contention that T-Mobile did not raise the argument that the charges were "frivolous" in proceedings before the agency overlooks that the Company disputed the charges and the idea that they had any merit at every step; and that the Board ultimately agreed. (*See* NLRB Br. at 35.)

Employee Handbook dating back to 2012, when the Company and CWA entered into a collective bargaining agreement. (P. Br. at 10-11; A-096, n.1.) The Board fails to mention that both this policy and the other challenged work rule, pertaining to attendance, were subject to a clear superseding clause in the parties' agreement providing that in the event of any conflict, the agreement governed. (P. Br. at 5-6; A-374-75, §3.) As to the allegedly unlawful unilateral change in the notice requirements for use of part-time off, a similar change had been made previously, without any objection from CWA. (P. Br. at 11-12.) Not surprisingly, these charges were all dismissed by both the Administrative Law Judge ("ALJ"), and that dismissal was adopted by the Board. It is, therefore, disingenuous for the Board to state that its "[f]indings of [f]act" included findings that "T-Mobile [m]a[de] [c]hanges to its Employee Handbook and [n]otice [r]equirements for [t]aking [l]eave [w]ithout [f]irst [n]otifying the Union." (NLRB Br. at 4.) The findings were that no notice or opportunity to bargain was required and that the absence thereof was, therefore, meaningless.

Further, although the Board cites its Casehandling Manual as if the blocking of a decertification election pursuant to an unfair labor practice charge is automatic and somehow immutable, the manual makes clear that it is discretionary. It instructs that an election should be held in abeyance as a result of a charge in circumstances where "the charge alleges conduct that, if proven, would interfere

with employee free choice in the election . . . ." (NLRB Br. at 5, Statutory and Regulatory Addendum at vii.) It also makes clear that "the policy is not intended to be misused by a party as a tactic to delay the resolution of a question concerning representation . . . ." (Id.) Given the unmistakable lack of merit to CWA's charges and the absence of any allegation, let alone evidence, that they tainted the employees' petitions, it is obvious that this is exactly how the charges were used here. It is also obvious that the Board's Regional Director had discretion in this matter and could have held an election in the many months following the decertification petition. Seven months had passed since the filing of these meritless charges, and the Regional Director still had not made any determination as to whether a complaint should issue. Instead, an election was blocked indefinitely, the parties' collective bargaining agreement expired, and a decision about whether an entirely new agreement should be executed had to be made.

It is within this context and from this position that T-Mobile took the reasonable step of suspending bargaining for a new agreement until an election was held. This was a step aligned with the policies of the Act, which the Board has, until this case, always espoused and attempted to balance: promoting stability in the bargaining relationship as well as employee free choice.

B. The Board Has Not Provided a Rational Justification, Consistent with its Precedent and the Policies of the Act, for its Decision, and the Decision is Not Supported by Substantial Evidence

1. The Board's Decision Is Not Supported by its Precedent

Contrary to the Board's repeated references to "established principles," (NLRB Br. at 12, 19-20, 36) the fact remains that in its decision in this matter the agency formulates a new rule and announces, for the first time, that an employer in possession of objective and undisputed evidence that a union has lost the support of a majority of its members has only two choices: 1) withdraw recognition from and thus completely sever any relationship with the union; or 2) over the employees' clearly stated desires, continue every aspect of the union relationship, including negotiation of a new collective bargaining agreement dictating these employees' terms and conditions of employment. The decisions the Board cites in support of the contention that this rule was somehow "established" prior to its decision here are *Levitz Furniture Co.*, 333 NLRB 717 (2001) and *Terrace Gardens Plaza, Inc. v. NLRB*, 91 F.3d 222 (D.C. Cir. 1996). Neither of these decisions supports the Board's argument.

As outlined in T-Mobile's opening brief (P. Br. at 17-18), *Levitz* merely altered the standards for withdrawal and for the filing of RM petitions. It eliminated an employer's ability to unilaterally withdraw recognition based on "good faith doubt," instead requiring a showing that the "incumbent union has, in

fact, lost majority support." *Levitz*, 333 NLRB at 723-25. It also eased the standard that employers must meet to obtain RM elections. *Id*. at 728-29. While the employer in *Levitz* also did not bargain for a new agreement, that was not at issue in the case. And in setting a new standard for withdrawing recognition, itself a bargaining violation if undertaken without the requisite proof, the Board did not announce that the same evidence that would support full withdrawal would not also support more restrained action with respect to a party's bargaining obligations.

Terrace Gardens involved an employer that refused to comply with a Board order requiring recognition of the union as the employees' representative, but attempted to fulfill the part of the order mandating bargaining. *Terrace Gardens*, 91 F.3d at 225-26. The union claimed that the employer's negotiating a contract while refusing to recognize the union, amounted to bad faith bargaining, and the Board and this Court agreed. *Id*. T-Mobile has not engaged in any such bad-faith bargaining here; to the contrary, the Company has continued to recognize CWA at all times that the parties have bargained, over anything. In addition, the Court's decision in *Terrace Gardens* was based in part on the statutory scheme applicable at the posture of that case and the employer's misunderstanding of the scheme in advancing its arguments. *Id*. at 225. That scheme requires an employer challenging a new union's certification to do so through one means—refusing to bargain with the union and raising the invalidity of the certification as an

affirmative defense to the failure to bargain unfair labor practice charge. *Id*. The same scheme is not applicable here. Another critical distinction is that unlike in *Terrace Gardens*, the challenge to CWA's representative status here comes from the employees, not T-Mobile, and does not pose an obstacle to the Company's ability to bargain with CWA in good faith. *Id*. at 226. For these reasons, the considerations that required the *Terrace Gardens* employer to either decline to recognize the union or bargain with it over a new agreement are not present in the case at hand.

The precedent that exists compels the conclusion that T-Mobile's action was lawful. The Board has long held that the type of evidence available to T-Mobile would have privileged the Company to withdraw recognition entirely and refuse to negotiate over anything. (*See* P. Br. at 22.) It is, therefore, unreasonable to conclude that T-Mobile violated the Act by taking the less drastic step of suspending only one, clearly-defined aspect of the bargaining relationship pending the outcome of a Board election. (*See* A-096, n. 7, then-Acting Chairman Miscimarra, dissenting.) Such conclusion is also inconsistent with the Board's decision in *Lexus of Concord, Inc*., 343 NLRB 851, 853-54 (2004), and its attempts to explain the inconsistency, are unavailing. There, the Board found that the employer acted lawfully when it temporarily suspended contract negotiations after receiving a petition similar to that received by T-Mobile. Contrary to the

Board's arguments, *Lexus of Concord* never placed a limitation on the amount of time during which it would be reasonable to suspend negotiations pending resolution of a question regarding representation, and T-Mobile's suspension was not "open-ended." (*See* NLBR Br. at 29-30.) Rather, it was always only intended to last only until an election. (A-599.) When that election occurred was up to the Board and to CWA, which could have filed a request to proceed. In substance, T-Mobile and the *Lexus of Concord* employer took the same action—place negotiations toward a new collective bargaining agreement on hold pending a determination as to the union's representative status—and the Board should have concluded that the action was reasonable in both instances. The Board's departure from its decision in *Lexus of Concord* is not well-reasoned.

And while the Board has the authority to formulate new rules to fulfill its statutory responsibilities, those rules must be "rational and consistent with the Act" and supported by "substantial evidence." *BPH & Co., Inc. v. NLRB*, 333 F.3d 213, 222 (D.C. Cir. 2003). They cannot rest on "specious" assumptions, as the rule announced by the Board does here. *Id*. Although the Board argues that its decision is supported by a reasonable balancing of the Act's dual policies of maintaining stability in the bargaining relationship and fostering employee free choice, the decision effectively forces the employer to choose one over the other—either disrupt the bargaining relationship in the most extreme way and cut out the

union altogether, or ignore the employees' desires and go as far as entering into a new collective bargaining agreement, which will, in turn, *prevent* any election or challenge to the union's majority status for an additional period of time. (A-097, n. 7, then-Acting Chairman Miscimarra, dissenting.) Curiously, the Board takes issue with T-Mobile's characterization of withdrawal of recognition as the most disruptive course of action, although logic requires recognizing that it is. And the Board itself has acknowledged that withdrawal of recognition from a union "*destroys* . . . the bargaining relationship." *See Levitz*, 333 NLRB at 724 (emphasis added). What the Board has not done is provide an adequate explanation for why an employer would be permitted to go that far; but would not be allowed to take a more restrained approach that recognizes the desire to maintain some stability in the bargaining relationship, the employees' right to choose or not choose a union as their representative and the Board's policy that the preferred way of assessing employee choice is through supervised elections.

2. The Board's Explanation Grounded in Alleged Concerns About the Stability of the Bargaining Relationship Is Not Rational and Is Refuted by the Record Evidence

The rationales offered by the Board do not withstand scrutiny. As to the first rationale, that suspending negotiations toward a collective bargaining agreement reduces parties' ability to reach compromise, it is based on an irrational hypothetical that, here, is actually refuted by the record evidence. It strains

common sense to argue that placing in abeyance one aspect of the bargaining relationship—that designed to reach a successor contract—would harm the parties' ability to reach compromise to a greater extent than withdrawing recognition from the union altogether. Indeed, withdrawal would ensure that no compromise would ever be reached.

The Board attempts to explain the damage to the bargaining process that it contends would ensue from a suspension in contract negotiations (as opposed to, presumably, withdrawal) by likening the former option to "selective" bargaining. However, as noted in the Board's dissent here, this characterization of T-Mobile's conduct "defies common sense." (A-097, then-Acting Chairman Miscimarra, dissenting.) "There is no resemblance between T-Mobile's restrained . . . actions . . . and what [the Board decision] attempts to portray as an arbitrary picking-and-choosing among different obligations imposed by statute." (Id.) As it represented it would do, aside from suspending negotiations for a successor contract, T-Mobile left every aspect of the bargaining relationship intact and bargained over every issue that triggered such obligation during its continued recognition of CWA. These issues included changes to the Company fleet policy, participation in an employee stock grant program, changes to mileage reporting for use of company vehicles, and a discharge-related grievance. (P. Br. at 9-10; A-165-170; A-365, ¶ 23; A-366, ¶¶ 30-31; A-313-335.) CWA chose not to pursue the grievance of its

own accord, and the parties reached agreement on all of the other matters. (Id.) In addition, CWA continued to present T-Mobile with requests for information, and the Company continued to respond to them. (*See*, *e.g.* A-171-72, A-336-38.)

In its brief, the Board attempts to paint T-Mobile's dealing with CWA on these issues as involving a selective approach whereby T-Mobile only contacted CWA and asked it to bargain over subjects of the Company's own choosing, with respect to which it had or "could gain a tactical advantage." (NLRB Br. at 23-24.) This attempt is not only based on pure speculation but actually counterfactual. CWA has never alleged that T-Mobile unlawfully refused to bargain over anything other than a successor contract, and could not have considering it has not made any proposals of its own, in bargaining for a successor agreement or otherwise.[5] Nor has CWA ever alleged that when T-Mobile did bargain, it employed any unlawful bargaining tactics. The Board's insinuations to the contrary, backed by no factual evidence whatsoever, should be disregarded, except as an illustration that the Board's ruling is not rational.

[5] The Board's dispute of this characterization of CWA's approach to bargaining (NLRB Br. at 35) requires it to willfully ignore that CWA *stipulated* that it cancelled the first three bargaining sessions and that when it did come to the table, neither CWA nor its local "made any proposals for a successor agreement." (A-365, ¶ 24-25.) It was *T-Mobile* that proposed to CWA that its members be permitted to participate in a wage increase to which they would not be eligible otherwise. (Id., ¶ 26; NLRB Br. at 35.)

Although it does not do so in its decision, the Board characterizes as "concrete examples" of the purported destabilizing and weakening effects of T-Mobile's actions two instances of the parties' bargaining—once over changes to the fleet policy and then again over mileage reporting and the tax implications thereof. (NLRB Br. at 9, 23-24.) First, the Board tries without any evidence to portray as unlawful or somehow born out of an unfair "tactical advantage" T-Mobile's bargaining "strategy" of proposing changes to the Company's fleet policy as part of a package also offering CWA employees the opportunity to participate in a Company stock program. (Id). Completely ignoring the fact that package proposals are a routine part of bargaining, the Board baselessly insinuates that CWA was somehow compelled to accept T-Mobile's proposal, purportedly as a result of the suspension of negotiations for a successor collective bargaining agreement. (Id.) There is zero support for this argument and, in fact, it is refuted by the record.

By way of background, changes to T-Mobile's fleet policy were governed by Article XI of the parties' collective bargaining agreement, titled "Vehicles." (A-254.) During the duration of the agreement, the Company was entitled to make any changes to the terms of vehicle usage, provided the changes matched those of employees outside the bargaining unit. (Id.; A-181-82.) After the expiration of the agreement, the existing vehicle usage terms were held in place pursuant to §8(d) of

the Act, and the Company was required to give CWA notice and an opportunity to bargain if it wished to alter them. *Milwaukee Spring*, 268 NLRB 601, 602 (1984) ("If the employment conditions the employer seeks to change are not [specifically] contained in the contract, however, the employer's obligation remains the general one of bargaining in good faith to impasse over the subject before instituting the proposed change.") (internal quotation marks and citations omitted). As it told CWA it would do, T-Mobile fulfilled this bargaining obligation.

As such, when T-Mobile wished to add language to the fleet policy, the Company gave CWA notice and an opportunity to bargain. (A-165-68; A-313-335.) The parties did just that and "c[a]me to agreement." (A-170.) CWA did not have to accept T-Mobile's package proposal (A-182), and T-Mobile did not need CWA's agreement to implement changes if bargaining reached impasse. CWA could have rejected the package proposal or made counterproposals, and the parties could have bargained to agreement or to impasse, at which point T-Mobile would have been privileged to implement its last, best and final offer on the subject. *Milwaukee Spring*, 268 NLRB at 602. This could have happened with or without T-Mobile offering the added benefit of participation in the Company's stock grant program as part of the package. *Id*. And while the Board implies, without basis or reasonable explanation, that there was something insidious about T-Mobile's tying the Union employees' participation in the stock grant program CWA's acceptance

of the changes to the language of the fleet policy, the evidence repudiates any such implication. This evidence shows that CWA had the opportunity to provide its position and input as to each of these items even though it had to reject or accept them separately; this much was made clear to the Union negotiator. (A-324-25 ("So we will wait to hear what, if any, input the [U]nion has on the proposed GPS changes, which as we explained, are what is going into place nationwide and then we can see if further discussion is necessary.").)

What is most telling about the unsubstantiated and arbitrary nature of the Board's arguments, however, is that with CWA's principal negotiator on the stand (A-151-52), neither the General Counsel nor CWA even attempted to elicit any testimony suggesting that the package offer was improper or that CWA was otherwise coerced into accepting it. Such testimony could not have been truthfully provided. On cross-examination CWA's negotiator confirmed that the Union had full opportunity and freedom to bargain on all issues raised after the suspension of contract negotiations:

> Q: Those things that we did in October and November weren't just notification, we talked to you about it.
> A: That's correct.
> Q: We sought your input and [in] one of the documents [T-Mobile] says, hey, just so we're clear, those two policies are tied together. You take one, you've got to take the other, correct?
> A: Yes. It was a package.
> Q: That's bargaining , right?
> A: *That's bargaining. Yes.*

> Q: *You could have rejected it*.
> A: . . . *Yes*.
> Q: Okay. But, you didn't, you accepted it, correct?
> A: Correct.

(A-182.) (emphasis added.) Accordingly, the Court should reject the Board's invitation to draw inferences that have no relationship to the facts in the record.

The same applies to the second "example[]" the Board provides in support of the argument that T-Mobile chose to bargain with CWA in areas in which the Company had an advantage, did not have to make concessions, or wanted CWA's agreement—the parties' negotiations over changes to mileage reporting. (NLRB Br. at 23-24, 26.) Not only is there zero evidence of any of these things, but an email from CWA's negotiator contradicts all of them. (A-327-333.) That email recommended acceptance of T-Mobile's proposal precisely because, as made, it "benefit[ed]" CWA members and allowed them to better handle the tax implications of their mileage reporting. (Id.)

In sum, the Board does not, as required, "tak[e] into consideration 'the record in its entirety . . . including the body of evidence opposed to the Board's view, and does not "draw[] all those inferences that the evidence fairly demands." *Pacific Micronesia Corp. v. NLRB*, 219 F.3d 661, 665 (D.C. Cir. 2000) (internal citations omitted). For this reason, too, its decision should be reversed.

i. The Facts at Hand Do Not Fit the Board's "Piecemeal Bargaining" Theory

The Board's efforts to bootstrap its explanation to the theory of "piecemeal bargaining" and to go as far as arguing that what T-Mobile did constituted piecemeal bargaining are improper and misplaced. (NLRB Br. at 23-24.) This theory of violation was never alleged or litigated, and the Board's decision only referred to it as consistent with the conclusion it reached. (A-095, n. 4.) As such, any assertion in the Board's brief that any of T-Mobile's actions amounted to or were unlawful under the theory of piecemeal bargaining is novel, improperly asserted at this stage, and without support.

The concept of piecemeal bargaining arises in and addresses an entirely different set of circumstances involving contract negotiations and a party's efforts to remove specific issues from the larger discussions, by insisting that they be negotiating separately or by unilaterally implementing proposals on those issues. (A-095, n. 4; P. Br. at 28.) *See also E.I. Du Pont de Nemours and Co. v. NLRB*, 489 F.3d 1310 (D.C. Cir. 2007). T-Mobile did not engage in any such conduct here—it never insisted on isolating bargaining subjects and it never unilaterally implemented proposals, during contract negotiations or otherwise. It simply negotiated with CWA regarding every-day matters, as they came up. Accordingly, piecemeal bargaining neither lends support to the Board's conclusion nor provides a theory under which it may be argued that T-Mobile acted unlawfully.

3. The Board's Explanation Grounded in Alleged Concerns about Potential Weakening of a Union that Has Lost Majority Support Is Not Rational and Is Refuted by Record Evidence

As outlined in part above, any argument that T-Mobile's suspending contract negotiations but otherwise continuing to recognize and bargain with CWA was unlawful because it weakened CWA, ignores the reality of the Union's position, the consequences that withdrawal of recognition would have had, and the evidence in the record. CWA had already lost the support of the majority of the employees. Had T-Mobile withdrawn recognition, as it was entitled to do, the Union would have been removed from the picture entirely. T-Mobile's restrained action permitted CWA to have a presence in the workplace and involvement in the day-to-day issues that arose, maintained unchanged the terms and conditions of employment that CWA negotiated and, accordingly, "*minimized* any perception that the Union was weak." (A-097.)

While the Board relies on the notion that delays in bargaining deprive the union of the ability to demonstrate its effectiveness to employees, it fails to recognize and adequately address the fact that here, the employees' support already was lost and a majority of them asked T-Mobile to acknowledge this lack of

confidence in CWA. This is an important distinction that renders this justification offered by the Board inapplicable.[6]

4. The Board's Other Arguments Should Be Rejected

As further evidence of its arbitrary ruling, the Board raises certain justifications for its decision for the first time on appeal. It develops a new explanation for concluding that T-Mobile's suspension of bargaining for a successor contract was unlawful—that the Company had to "remain neutral" or "maintain neutrality" in light of the pending decertification election. (NLRB Br. at 21, 25-26.) This is not an explanation that the Board advanced or even indicated it considered as part of its decision in this case and the *ad hoc* rationale must be stricken and rejected. Moreover, as discussed above, there was never any sign that a decertification election would take place at any point. It still has not.

Nor does the Board's conclusion rely, to any extent, on the argument that T-Mobile waited too long from the time that it received the employees' petition to suspend bargaining for a new agreement. (NLRB Br. at 30.) Accordingly, this justification, advanced for the first time here, must also be disregarded and

[6] The distinction applies equally to the Board's reliance on the general rationale that requiring the employer to bargain eliminates its temptation to avoid its bargaining duties in the hopes that delay will undermine employee support for the union. (NLRB Br. at 17.) Majority support for CWA had already eroded and concrete, unchallenged evidence of that existed.

rejected. Even if this argument had any merit, which it does not, the requirement is that the Board's decision, not its brief on appeal, must be well-reasoned.

Regarding the Board's contention that T-Mobile argues the Company, not the Board, should be the party balancing the interests, it is incorrect. T-Mobile only asserts that its conduct was consistent with the core policies of the Act and with the balance the Board has always struck between them, whereas the Board's decision departs from these principles without reasoned justification. (P. Br. at 15-21.) The justifications offered by the Board simply do not support its decision, and the decision should be reversed.

CONCLUSION

For the foregoing reasons and those set forth in T-Mobile's opening brief, the Court should grant T-Mobile's Petition for Review, set aside the Board order, deny the Board's cross-petition for enforcement, and remand this case to the Board for dismissal.

Dated: August 3, 2017

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ADDENDUM TO PETITIONER'S REPLY BRIEF

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2017 WL 3255163
United States Court of Appeals,
District of Columbia Circuit.

FRED MEYER STORES, INC., PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 15-1135
|
Consolidated with 15-1167
|
Argued February 14, 2017
|
Decided August 1, 2017

On Petition for Review and Cross-Application for Enforcement of an Order
of the National Labor Relations Board

Attorneys and Law Firms

Mitchell J. Cogen argued the cause and filed the briefs for petitioner.

Eric Weitz, Attorney, National Labor Relations Board, argued the cause for respondent. With him on the brief were Richard F. Griffin, Jr., General Counsel, John H. Ferguson, Associate General Counsel, Linda Dreeben, Deputy Associate General Counsel, and Robert J. Englehart, Supervisory Attorney.

Before: BROWN, Circuit Judge, and SENTELLE and RANDOLPH, Senior Circuit Judges.

Opinion

Opinion for the Court filed by BROWN, Circuit Judge.

***1** BROWN, *Circuit Judge*: Petitioner Fred Meyer Stores, Inc. ("Fred Meyer") operates big-box stores —selling both grocery and non-food goods—in the northwest United States. It operates several stores in the Portland, Oregon area, including the Fred Meyer Hillsboro Store (the "Store") at issue here. On October 15, 2009, an encounter between Fred Meyer employees and representatives of the United Food and Commercial Workers Union (the "Union")[1] escalated and resulted in the arrests of three individuals. Affirming the prior decision of an Administrative Law Judge ("ALJ"), the National Labor Relations Board ("Board" or "NLRB") held Fred Meyer had committed various unfair labor practices in its interaction with the Union.[2] Fred Meyer now petitions for review of the Board's decision.

I.

The Collective Bargaining Agreement ("Access Agreement") between the Union and Fred Meyer set the conditions upon which non-employee Union representatives may visit the Store. The relevant provision states:

> It is the desire of both the Employer and the Union to avoid wherever possible the loss of working time by employees covered by this Agreement. Therefore, representatives of the Union when visiting the store or contacting employees on Union business during their working hours shall first contact the store manager or person in charge of the store. All contact will be handled so as to not interfere with service to customers nor unreasonably interrupt employees with the performance of their duties.

JA 578; *see also* JA 29 (ALJ Opinion misquoting the Access Agreement). The parties had also developed an agreed-upon practice, memorialized in a memorandum, for Union representative visits:

> Business agents have the right to talk BRIEFLY with employees on the floor, to tell those employees they are in the store, to introduce themselves, and to conduct BRIEF conversations, as long as the employees are not unreasonably interrupted. Such conversations should not occur in the presence of customers.
>
> Business Representatives have the right to distribute fliers to employees on the floor AS LONG AS IT IS DONE QUICKLY, THE EMPLOYEES ARE NOT URGED TO STOP WHAT THEY ARE DOING TO READ THE MATERIALS AT THAT TIME, AND FURTHER, THAT THE MATERIALS ARE NOT PASSED OUT IN THE PRESENCE OF CUSTOMERS.

***2** Business agents have the right to distribute materials in the break room. Lengthy conversations

and discussions should always take place in the break room ....

See 2015 Board Opinion, 362 N.L.R.B. No. 82 at *1 n.3 (quoting the written procedures). Over the course of their twenty-year history, the parties had agreed conversations of up to two minutes may occur on the sales floor. While not discussed in the memorandum, the Union also limited itself to two Union representatives in the Store at any given time—often a single Union representative, and occasionally, an accompanying trainee. Where prior visitations had escalated into disputes, Fred Meyer called the police, and the Union representatives left of their own accord.

But then things changed. Bargaining for successor Union contracts began in July 2008,[3] and in November of that year, the leadership of Local 555 shifted. The new Union President called in reinforcements from the International, and Jenny Reed ("Reed") arrived to energize the Union's efforts. During August and September of 2009, the two months immediately prior to the incident at issue here, representatives visited the Local 555 stores more frequently and twice arrived at Fred Meyer stores (but not the Hillsboro Store) with three or four representatives. By September 25, 2009, Local 555 leadership declared itself a "FIGHTING UNION" and promised it would do whatever was necessary to further its interests. JA 56 (ALJ Opinion), 767–71; *see also* JA 252–53.

On October 14, 2009, Store manager Gary Catalano ("Catalano") engaged in a heated discussion with Union representatives at the Store. The exchange ended with a threat from the Union representative to return the following day with reinforcements. *See* JA 34 (ALJ Opinion quoting Catalano's recollection of the Union representative's statement: "[W]ell what if I just bring in 15 or 20 more people tomorrow and we just do our thing tomorrow ... ?"). Catalano discussed the interaction with his superior Cindy Thornton ("Thornton"), who generated a protocol to follow if multiple representatives descended upon the Store: (1) Catalano would reiterate the visitation practice; (2) Catalano would ask representatives to leave the Store; (3) Loss Prevention, the Store's security team, would ask the representatives to leave the Store; and (4) Catalano would telephone Thornton again and, with her permission, call the police. Catalano held a meeting with his managers, including Home Department Manager James Dostert ("Dostert"), to train them on the policy.

The Union also prepared for confrontation. Members of Local 555 and the International convened and devised a plan to send several representatives into the Store the following day. The Union anticipated its actions would prompt a response from Fred Meyer, and its members conducted a training session in order to "be able to deal" with events at the Store the next day. JA 35 (ALJ Opinion), 361–63. For example, they decided Reed would "take [the] arrest" if matters escalated. JA 35 (ALJ Opinion).

The showdown occurred on October 15, 2009. A team of eight individuals arrived at the Store around 9:30 a.m. The Union contingent included Reed and Joe Price from the International along with Brad Witt ("Witt"), Kevin Billman, Mike Marshall ("Marshall"), Kathy MacInnis ("MacInnis"), and Jeff Anderson from Local 555. Witt, an Oregon State Representative at the time, also asked his campaign manager, a local freelance photographer, to join them in hopes of "get [ting] a story." JA 36 (ALJ Opinion).[4] The group carpooled to the site and entered the Store simultaneously, fanning out in pairs to different entrances. Only Reed and Witt went to the Customer Service Desk to check in. They also took the unusual step of asking to speak face-to-face with the Manager on Duty. Since Catalano was off that day, Dostert met with Reed and Witt.

***3** Here, the stories diverge. The NLRB asserts Dostert told the two representatives "their contact with employees on the store floor would be limited to identification and introductions and that any additional communications would need to take place in the breakroom." *2015 Board Opinion*, 362 N.L.R.B. No. 82 at *2. Fred Meyer, on the other hand, argues Dostert explained the Union representatives had a "right to walk the floor, engage with associates for a minute or two, hand out your card; anything lengthier than that needs to go to the break room." JA 472.

Thereafter, Reed held up a piece of paper and said she and Witt had a right under "federal law" to "talk to [employees] as long as [they] wanted to." JA 41 (ALJ Opinion). After further discussion, Reed told Dostert he was violating federal law, and he could be arrested. Dostert then called Thornton, who reiterated the long-standing policy—which had been re-confirmed the prior

day—and instructed Dostert to again explain the Union representatives may conduct brief conversations on the sales floor and longer conversations would need to occur in the breakroom. The conversation between Dostert, Reed, and Witt continued, growing ever more heated, and Dostert attempted to move the discussion away from customers. During this period, Local 555 vice-president Shaun Barkeley ("Barkeley") phoned Thornton and rebuffed an offer from her to sit down and talk about the Union's concerns with the current policy, stating "you do what you have to do and I'll do what I have to do." JA 44 (ALJ Opinion quoting Thornton's recollection of Barkeley's response).

Reed then approached Store cashier Alicia England ("England") and abruptly handed her a piece of paper; England moved away. By then, Dostert had received a number of calls informing him that multiple Union representatives were present in the Store. He phoned Thornton a second time to relay the news; she again stated the policy and asked Dostert to repeat it once again to the Union representatives, informing them that if they did not comply, they would need to leave the Store. Reed and Witt again refused to comply or depart. At some point in this interaction, while still near England, Dostert began angrily disparaging the Union, stating among other things: union representatives are "jerks," unions are "outdated and ridiculous," and union dues are "ridiculous." JA 39–40 (ALJ Opinion), 42 (same), 75–79, 827–29.

Dostert subsequently called the Store's Loss Prevention Manager, Mike Kline ("Kline"), who explained the Store's trespass rules and asked Reed and Witt to leave. Shortly after Kline arrived, Dostert received a call; while Dostert was speaking on the phone, Witt got in Dostert's face and repeatedly yelled "liar!" [5] JA 432, 483. After the call ended— and Kline had instructed Witt to back off—the other five Union representatives joined the group around Dostert. Following a phone conversation with Thornton, Dostert asked Kline to call the police.

Hillsboro Police Officers Daniel Mace ("Officer Mace") and Victor Kamenir ("Officer Kamenir") arrived around 10:10 a.m. After Dostert again asked Reed to leave the Store, Officer Mace explained to Reed that, under Oregon trespass law, she was obliged to leave and would be taken into custody if she refused. Reed refused and was arrested. The other representatives in the Store obeyed the instruction to leave. Marshall and MacInnis then walked through the parking lot to the carpool vehicles, but they were unable to unlock the cars and waited in the parking lot for the drivers. Sergeant Matthew Shannon ("Sergeant Shannon"), who had arrived on the scene, told Marshall to leave the property. Thereafter, Marshall became agitated and "tried to engage the [S]ergeant." JA 308. The scene became "a little hairy" and got "a little out of hand," so backup units were called. JA 502–03. After offering Marshall several opportunities to leave the premises, Officer Kamenir placed him under arrest. MacInnis was not arrested.

***4** Finally, Local 555 President Dan Clay ("Clay") arrived at the scene, identified himself to Sergeant Shannon, and told the Sergeant to "look at the Federal law before he arrest[ed] people." JA 46 (ALJ Opinion quoting Clay's testimony). Clay proceeded to inform Sergeant Shannon that the arrests of Reed and Marshall were illegal, at which point Sargent Shannon told him "another word and you're done." JA 47 (ALJ Opinion quoting Clay's testimony). Clay continued to argue and refused to leave, at which point Sergeant Shannon instructed Officer Kamenir to arrest Clay.

The NLRB affirmed the ALJ's finding that Fred Meyer had changed "longstanding and contractually-based practice" and committed unfair labor practices "by limiting the union agents' right to contact store employees," "telling employees not to speak to the union representatives, disparaging the Union in the presence of employees, threatening to have union representatives arrested, and causing the arrest of three union representatives." *2015 Board Opinion*, 362 N.L.R.B. No. 82 at *1, *3. The Board's Order requires the Company to make Reed, Marshall, and Clay whole for any costs arising from their arrests and post a remedial notice at its union-represented stores covered by the Access Agreement. A dissenter, Member Johnson, disagreed with the Board's findings regarding the representatives' ability to speak with Union employees on the Store floor; the events leading up to the arrests of Reed, Marshall, and Clay; and certain statements by manager Dostert (excluding the order to a unit employee not to speak with the Union representatives).

II.

"Judicial review of NLRB determinations in unfair labor practice cases is generally limited, but not so deferential that the court will merely act as a rubber stamp for the Board's conclusions." *Titanium Metals Corp. v. NLRB*, 392 F.3d 439, 445 (D.C. Cir. 2004). We will affirm an order of the Board if its findings with respect to questions of fact are supported by substantial evidence on the record considered as a whole. *See* 29 U.S.C. § 160(e). "Substantial evidence" is "less than a preponderance of the evidence," albeit "more than a scintilla." *Multimax, Inc. v. FAA*, 231 F.3d 882, 887 (D.C. Cir. 2000). More specifically, it "requires not the degree of evidence which satisfies the *court* that the requisite fact exists, but merely the degree which *could* satisfy a reasonable factfinder." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 377 (1998). The question before the Court, therefore, "is not whether [Fred Meyer's] view of the facts supports its version of what happened, but rather whether the Board's interpretation of the facts is reasonably defensible" and one which a reasonable factfinder would support. *Inova Health Sys. v. NLRB*, 795 F.3d 68, 81 (D.C. Cir. 2015).

A.

It is well-established that employers can generally prohibit labor organization activities by nonemployee union representatives conducted on business property. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). In fact, "[N]onemployee organizers cannot claim even a limited right of access to a nonconsenting employer's property until after the requisite need for access to the employer's property has been shown." *Id.* at 534. Accordingly, any right of the Union representatives to enter the Store on October 15 must derive from the parties' Access Agreement and past practice, not federal law. Put another way, nonemployee union agents on an employer's premises for the purpose of communicating with represented employees are engaged in activities protected by Section 7 of the National Labor Relations Act, 49 Stat. 452, *as amended*, 29 U.S.C. § 157 ("NLRA" or the "Act"), *only to the extent* that they comply with the parties' contractual access clause. Even the Board acknowledges this simple proposition. It begins its analysis, as it must, with the text of the parties' Access Agreement and the nature of their past practice; from there, it analyzes the parties' actions. *2015 Board Opinion*, 362 N.L.R.B. No. 82 at*1–*2. Moreover, in order to establish a NLRA violation, the General Counsel of the NLRB carries the burden to show the Union representatives were in compliance with the parties' Access Agreement. *See NLRB v. Great Scot, Inc.*, 39 F.3d 678, 684 (6th Cir. 1994) (finding reversible error where the burden was incorrectly placed on the employer).

***5** Here, the record—if not the ALJ decision or the opinions of the Board—clearly reflects a violation of the Access Agreement. All parties agree that the Union representatives entered the Store on October 15 without checking in as required by the parties' contract. Even the ALJ acknowledged this undisputed fact should be dispositive. *See* JA 49 n.16 (ALJ Opinion stating, "The test of any misconduct herein therefore is an objective one as opposed to subjective. Thus the test is not what misconduct the Respondent's deciding agents believed occurred by the union agents at the store at relevant times but rather what misconduct did in fact occur."). As of the moment the Union representatives walked through the doors to the Store without notifying management of their presence—at least 5 minutes before Dostert first opened his mouth and long before anyone was arrested—they had become trespassers Fred Meyer could lawfully expel from the Store. *Cf. Times Publ'g Co.*, 72 N.L.R.B. 676, 683 (1947) ("[A]lthough the Act imposes no affirmative duty to bargain upon labor organizations, a union's refusal to bargain in good faith may remove the possibility of negotiation and thus preclude the existence of a situation in which the employer's own good faith can be tested. If it cannot be tested, its absence can hardly be found.").

Inexplicably, however, counsel for Fred Meyer has deprived us of this straightforward disposition by failing to present to the Board argument regarding the Union representatives' failure to check in. *See* 29 U.S.C. § 160(e). Counsel's omission diverts us onto a long and lumbering road. Nevertheless, as discussed below, inconsistencies in the Board's opinion require us to remand this matter to the Board to consider whether the union representatives lost the protection of the Act.

B.

Our review of NLRB decisions is "limited," *Wayneview Care Ctr. v. NLRB*, 664 F.3d 341, 348 (D.C. Cir. 2011), and "a decision of the NLRB will be overturned only if the Board's factual findings are not supported by substantial evidence, or the Board acted arbitrarily or otherwise erred

in applying established law to the facts of the case," *Pirlott v. NLRB*, 522 F.3d 423, 432 (D.C. Cir. 2008). Here, the Board behaved in an arbitrary and capricious manner by failing to engage in reasoned decisionmaking. In assessing the Board's decision, we must ensure it "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing that explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Motor Vehicle Mfgs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Board's decision is arbitrary if it "entirely fail[s] to consider an important aspect of the problem" or "offer[s] an explanation for its decision that runs counter to the evidence before the agency." *Id.* Accordingly, our deferential standard of review applies only where "the process by which [the Board] reaches [a] result" is "logical and rational"—in other words, the Agency has engaged in "reasoned decisionmaking." *Allentown Mack*, 522 U.S. at 374.

Having carefully examined both the Board's findings and its reasoning, we conclude the Board's opinion is more disingenuous than dispositive; it evidences a complete failure to reasonably reflect upon the information contained in the record and grapple with contrary evidence—disregarding entirely the need for reasoned decisionmaking. *See Haw. Dredging Constr. Co. v. NLRB*, 857 F.3d 877, 881–82 (D.C. Cir. 2017). The Board totally ignores facts in the record and misconstrues the findings of the ALJ. *See Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1282 (D.C. Cir. 1999) ("The court must take account of anything in the record that fairly detracts from the weight of the evidence supporting the Board's conclusion."). Even clear statements by the dissent pointing out the inconsistencies did not dissuade the Board's majority. *See Haw. Dredging*, 857 F.3d at 881; *see also Am. Gas Ass'n v. FERC*, 593 F.3d 14, 20 (D.C. Cir. 2010) ("While FERC is not required to agree with arguments raised by a dissenting Commissioner, it must, at a minimum, acknowledge and consider them."). In a concession to brevity, we examine only two particularly outrageous instances here.

***6** *First*, and most egregiously, the Board stated the ALJ had found "the parties did not have a clearly defined practice with regard to the number of union agents permitted to be in a store at any one time." *2015 Board Opinion*, 362 N.L.R.B. No. 82 at *1. From this premise, the Board concluded "[t]he visitation policy does not limit the number of representatives that may visit a store at one time." *Id.* at *3. But the ALJ made no such finding on this central issue. Instead, he stated:

> *I have made no findings* respecting either the reasonableness of having eight visiting Union agents in a store at one time under the [relevant] contract language ... or whether or not such actions were, as of October 15, 2009, inconsistent with past practice. I find that I simply do not need to because the question is irrelevant to the resolution of the complaint allegations.

JA 56 (ALJ Opinion) (emphasis added). The Board's mischaracterization is all the more pernicious because it relied upon its assertion of the ALJ's "finding" to resolve a central, disputed issue in the case: whether or not the Union representatives violated the Access Agreement and lost protection under the NLRA.[6] The Board's tone deafness—even after the dissent drew attention to the error—is the antithesis of "reasoned decisionmaking."

Second, the Board asserted, without citation, "Reed disagreed with Dostert's instructions" directing her to conduct conversations regarding the petition in the breakroom, "and she offered to show him a copy of the parties' contractual visitation policy. Dostert declined to read or consider the policy." *2015 Board Opinion*, 362 N.L.R.B. No. 82 at *2. No such finding of fact pertaining to the pivotal exchange appears in the ALJ's opinion. To the contrary, the ALJ acknowledged many of the events taking place when Witt and Reed "checked-in" with Dostert were the subject of *intense* debate. And while the ALJ spent substantial time discussing the initial words exchanged between Reed, Witt, and Dostert and the proceedings leading up to the arrests, he expressly declined to determine precisely what occurred at each step of the heated discussion that continued in the interim. JA 51 (ALJ Opinion noting conduct during that conversation was "in dispute"). Specifically, he stated,

> The running conversation of the three — Dostert/Reed/Witt, as I chose to label it, was lengthy, moved several times within the store and ... involved others. I do not find that everything that Dostert testified he or others stated in that conversation should be discredited or that Witt or Reed was complete or perfect in his or her testimony.

JA 55 (ALJ Opinion). The Board's assertion, a statement that goes to the heart of the disputed issues in the case, is therefore the product of unmoored supposition rather than reasoned decisionmaking.

In short, the Board—purposefully or absentmindedly—misrepresented several of the ALJ's findings and failed to respond to key points raised by the dissent. We cannot defer to a Board that has not adequately considered the issues raised by the parties; accordingly, we remand for the Board to determine whether the Union representatives are entitled to the protection of the Act.

III.

***7** The Court next considers the arrests of Reed, Marshall, and Clay. Since the arrests were caused primarily by the Union representatives' refusal to obey the orders of police officers, we reverse the Board's findings on this matter.

The NLRA was "designed to protect *both* individual and collective rights, and ha[s] as [its] paramount goal the promotion of labor peace through the collective efforts of labor and management." *Titanium Metals Corp. v. NLRB*, 392 F.3d 439, 447 (D.C. Cir. 2004). Consistent with this purpose, once Reed and Witt believed Dostert's original articulation of the visitation policy narrowed their ability to speak with Store employees, they had two options: (1) briefly protest, explaining what they believed the correct policy permitted or (2) grieve the matter through formal channels. Their right to remain in the Store, therefore, endured for only a few minutes after they began speaking with Dostert. And it evaporated completely once Reed and Witt continued to engage in a loud and heated discussion several minutes later, even after Thornton's (indisputably correct) view of the policy had been discussed.

It is axiomatic that an employer, even an employer running a union shop, may generally avail itself of the assistance of law enforcement and press trespassing charges against those impermissibly occupying its property following a direction to leave. *Baptist Memorial Hosp.*, 229 N.L.R.B. 45, 46 (1977) (finding employer liability only where the arrest "stemmed solely from [the employer's] persistent effort to maintain and enforce its unlawful policies and to thwart the protected organizational activities of its employees").

The Board's brief correctly points out that Dostert had summoned the police, informed the police that he wanted the Union representatives removed from the premises, and looked on without intervening as the police arrested all three Union representatives for criminal trespass. In the words of the ALJ Opinion, the "causation [was] linear." JA 58. But, as the Board has held, a violation occurs only where an employer "engage[s] in conduct that has the intended and foreseeable consequence of interfering with employee Section 7 rights." *Wild Oats Mkts., Inc.*, 336 N.L.R.B. 179, 181 (2001); *see also Baptist Memorial Hosp.*, 229 N.L.R.B. at 46 (holding an employer liable where an arrest "stemmed solely from the [employer's] persistent effort to maintain and enforce its unlawful policies and to thwart the protected organizational activities of its employees"). Indeed, this policy is consistent with the intent of the Act; the NLRA, like all federal statutes, "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape*, 365 U.S. 167, 187 (1961), *overruled on other grounds*, *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 664 (1978).

Here, the intervening illegal acts of Reed, Marshall, and Clay—each refusing to obey an order issued by a police officer—break the chain of causation between Dostert's actions and the arrests. On all prior occasions, Union representatives had left the Store when disputes arose—either on their own or after encouragement by a police officer. On October 15, 2009, however, the Union representatives departed from their prior practice and escalated their interactions with police officers. Neither the Board nor the ALJ focused on this exchange. Instead, they held—without further analysis—that Dostert's violation of the Act created a duty to prevent the Officers from arresting the Union representatives. Nonetheless, the record covers extensively the events that transpired once the Officers arrived. *See LCF, Inc. v. NLRB*, 129 F.3d 1276, 1281 (D.C. Cir. 1997) ("[T]his court's analysis considers not only the evidence supporting the Board's decision but also whatever in the record fairly detracts from its weight."). Viewed through the proper legal lens, the evidence demonstrates the Union representatives' own behavior led to their arrests.

***8** The testimony of the Officers present at the Store clearly indicated the Union representatives were arrested because they "refused to comply with police instructions." JA 522. [7] Officer Mace testified that if Reed had "followed [his] instruction" to leave, he "would have had no reason to" arrest her. JA 500. Instead, "she just stuck her hands out" to be handcuffed and, in Officer Mace's words: "[W]hat am I going to do at that point?" JA 499. Marshall and Clay had argued with the police officers and "didn't listen" to the Officers' commands. In fact, Marshall and Clay admit they were warned that if they did not leave they would be arrested. JA 309 (Marshall testimony recalling the police said "you need to leave, you need to leave. I said, sergeant, can I please speak with you? He was continuing to say, you need to leave."); 338 (Clay testimony recalling "[t]he officer turned back and said [I] need[ed] to leave ... he basically said no more discussion, or else I was going to be arrested"). After several failed attempts to encourage the men to leave the scene, the officers arrested them. Under these circumstances—where the individuals arrested had broken with prior practice and then failed to obey the Officers' commands despite repeated opportunities to comply and avoid arrest—we can hardly say the arrests amounted to a violation on the part of Fred Meyer. *See generally Borquez v. City of Tucson*, 475 F. App'x 663, 665 (9th Cir. 2012) ("Considering that Borquez approached an officer leading an arrestee to a police vehicle, verbally challenged the officer's actions, and grabbed the arm of the officer, we conclude that a reasonable officer in Pacheco's position could have believed that probable cause existed to arrest Borquez for interfering in governmental operations ...."). [8]

Under the circumstances, we find Fred Meyer's actions did not constitute a NLRA violation, and we reverse the Board's conclusions regarding the arrests. *See Skyline Distributors v. NLRB*, 99 F.3d 403, 410 (D.C. Cir. 1996) (examining the record and reversing in part despite finding the Board's opinion "so lacking in evidentiary support and reasoned decisionmaking that it seems whimsical").

IV.

Finally, the Court considers the anti-union statements allegedly uttered by Dostert near employee England. An employer violates Section 8(a)(1) of the Act if he makes statements with a "reasonable tendency" to "interfere with, restrain, or coerce" an employee's exercise of his statutory rights. *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 124 (D.C. Cir. 2001); 29 U.S.C. § 158(a)(1). Therefore, an employer's statements "must be viewed in context and not in isolation to determine if they [had] the reasonable tendency proscribed by Section 8(a)(1)." *Turtle Bay Resorts*, 353 N.L.R.B. 1242, 1278 (2009). "It is well settled that the Act countenances a significant degree of vituperative speech in the heat of labor relations. Indeed, words of disparagement alone concerning a union or its officials are insufficient for finding a violation of Section 8(a)(1)." *Id.* [9]

All parties admit that immediately after informing England that she could not speak with the Union representative, Dostert stated union representatives are "jerks;" unions are "outdated and ridiculous;" union dues are "ridiculous;" employees "did not need a union;" the Union stole money from its members; and he did not believe in unions. JA 26 (ALJ Decision), 37 (same); *2015 Board Opinion*, 362 N.L.R.B. No. 82 at *2. According to Witt's testimony, Dostert later said "he had his boss'[s] backing and that the union reps were going to be removed from the store." JA 378. Even assuming employee England heard these statements—a matter the parties now dispute—Dostert's anti-union comments and threats to remove non-employee Union representatives were not sufficiently coercive to establish a violation of the Act as a matter of law.

***9** These statements, while no doubt intemperate and ill-advised, do not constitute the type of threat required to render an employee's speech impermissibly coercive. Indeed, Dostert's outburst seemed to have been a response to considerable provocation: Witt interrupting his phone call by calling him a liar; Reed ignoring his instruction and insisting there could be no restriction on the length of her conversations with employees; and Dostert receiving multiple calls reporting that Union representatives who had not checked in were contacting employees in violation of the Access Agreement. Under the circumstances, a reasonable onlooker would interpret Dostert's statements as an expression of frustration directly responding to the events that had just transpired, not a threat or even a statement of forward-looking policy.

The facts of *Turtle Bay* are instructive. There, a manager "engaged in a[n unprovoked] tirade" against a union organizer present in the workplace cafeteria

that "included a threat to discipline any employee who talked to" the organizer. *Turtle Bay Resorts*, 353 N.L.R.B. at 1278. Moreover, the employer "put teeth in his threat ... by saying the NLRB did not control him and he was not interested in what the NLRB did." *Id.* The Board found the employer's "disparagement of [the organizer], coupled with his threat to discipline any employee who talked to [the organizer], ha[d] a reasonable tendency to coerce employees or interfere with Section 7 rights in violation of Section 8(a)(1)." *Id.* at 1279. Clearly, the statements at issue in *Turtle Bay* were highly inflammatory and included a direct threat to discipline employees for engaging in protected activity; combined with the speaker's cavalier attitude while instigating a confrontation with the organizer, they could have been viewed by a reasonable employee as coercive. Here, however, making general negative statements about unions and then threatening to do what an employer has the lawful right to do is entirely distinguishable. [10]

V.

In short, the Board's actions in this matter are more consistent with the role of an advocate than an adjudicator. Accordingly, Fred Meyer's petition is granted, and the Board's cross-application for enforcement is denied. The case shall be remanded to the Board for further consideration consistent with this Opinion.

So ordered.

All Citations

--- F.3d ----, 2017 WL 3255163

Footnotes

1 The Union, as relevant to this case, is comprised of the "Local 555," the smallest entity covering the Store, and its "International," a larger division of the same Union.

2 The ALJ issued his decision in this matter on December 8, 2010. *Fred Meyer Stores*, No. 36-CA-10555, 2010 WL 5101099 (Dec. 8, 2010). The Board issued its initial Decision and Order in this matter on December 13, 2012. *Fred Meyer Stores, Inc.*, 359 N.L.R.B. 316 (2012) ("*2012 Board Opinion*"). The 2012 Order was set aside after the Supreme Court's decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). On April 30, 2015, a properly-constituted Board panel considered the record *de novo* and issued the Decision and Order now before the Court. *Fred Meyer Stores, Inc.*, 362 N.L.R.B. No. 82 (2015) ("*2015 Board Opinion*").

3 New contracts were finalized in 2010.

4 There is some dispute regarding whether the freelance photographer—the eighth individual—is properly considered a member of the Union team. We do not decide this issue here, but both the ALJ and Board consistently referred to "eight" Union representatives. *See, e.g.*, JA 35, 50, 161, 194 n.7. We will follow this convention here.

5 The ALJ did not discuss this point. Nonetheless, in the absence of an adverse credibility finding with regard to the relevant testimony, the fair inferences that can be drawn from it must be made. *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 378 (1998) (holding that the Board "is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands").

6 We note the ALJ's opinion is a bit confused on this issue, also stating "[t]here is no doubt that union practice typically involved one agent at a time, with two agents occasionally." JA 31 (ALJ Opinion). Regardless, the ALJ certainly did not find "no[ ] limit" on the number of Union representatives simultaneously visiting the Store, as the Board now claims. *See 2015 Board Opinion*, 362 N.L.R.B. No. 82 at *3.

7 The record indicates the scene at the Store was anything but calm. By the time Officer Mace's superior, Sergeant Shannon, joined him on the scene, the confrontation had escalated to the point that Sergeant Shannon "call[ed] for code 3 cover," which Officer Mace described as a call for all on-duty police officers to rush to the scene with "lights and sirens." JA 502, 511. He observed "[t]he whole city showed up, officer-wise" and explained police officers "don't make [code 3 cover] calls lightly" due to the risk that officers rushing to the scene could injure citizens in their haste. JA 511–12.

8 Fred Meyer also argues the First Amendment protects its decision to call the police and immunizes the Store for the resulting arrests. *See United Mine Workers v. Pennington*, 404 U.S. 508 (1972); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). Unfortunately, this point was not addressed before the Board, and the Court is jurisdictionally barred from entertaining it absent "extraordinary circumstances." 29 U.S.C. § 160(e); *Alden Leeds*, 812

F.3d at 166–68. In light of the Court's disposition of this matter, we do not reach the question whether Fred Meyer forfeited its First Amendment claim pertaining to the arrests.

9 Because we conclude that Dostert's statements did not have a "reasonable tendency" to "coerce," 29 U.S.C. § 158(a)(1), we do not need to determine whether they are protected under 29 U.S.C. § 158(c).

10 Any First Amendment argument regarding Dostert's alleged anti-union statements has been forfeited by Petitioner. Although such an argument might be dispositive in a future case, we will leave that question for another day.

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Dated: August 3, 2017

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/s/ Mark Theodore
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United States Court of Appeals
for the District of Columbia Circuit

T-Mobile USA, Inc. v. NLRB, No. 17-1065, 17-1111

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